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Overview

Low-Income Housing Tax Credit (LIHTC) Program

Key Components

- **Number of Units:** about 2,000,000, growing at about 100,000 annually, at a foregone revenue cost anticipated to be nearly \$ 8 billion per year
<http://www.huduser.org/portal/datasets/lihtc.html>; credit allocation increased and indexed Dec. 2000. Now \$2.25 x state population or minimum of \$2.6 million.
- **How Program Works: Subsidy Mechanism:** fixed amount of tax credits given to state Housing Finance Agency (HFA), which competitively allocates credits under Qualified Allocation Plan (QAP); (find the amount allocated to your state at http://www.novoco.com/low_income_housing/lihtc/federal_lihtc.php. Investors buy income tax credits in qualified properties that have received state allocation, creating cash equity for owner that reduces project development debt burden, in exchange for agreement to rent a specific number of units to qualified tenants at specified rents, usually below-market. Unused amounts get reallocated to other states. Two tax credits are available: one at 9% of depreciable basis, competitively allocated; the other, at 4% of depreciable basis, comes with state bond financing, which is capped and allocated by a state agency, which may or may not be very competitive.
- **Ownership:** During recapture period, usually limited partnerships, in which individuals and corporations invest as limited partners, with corporate, nonprofit, or individual general partners; after credits used, properties often later sold to general partner or others, often with new credits & re-syndication.
- **Use Restrictions:** *Occupancy restrictions* (federal minimum): owner's choice of two: at least 20% of units occupied by tenants at no more than 50% of AMI, or 40% of units occupied by tenants at no more than 60% of AMI; many projects have 100% LIHTC units. *Rent restrictions:* those units must have "affordable" flat rents set at 30% of income of tenants at the top of the selected AMI category, with an assumed family size of 1.5 persons per bedroom. For properties developed between 1986 and 1989, these restrictions last only 15 years; post-1989 developments have at least 30 years, and up to 55 years in some states. Because tax credits are competitively allocated, *states may impose more restrictive requirements than the Code minimum, e.g.,* greater percentages of restricted units, deeper income targeting and rent levels, or longer use restrictions. In any event, LIHTC owners may not refuse to rent to Voucher holders because of their status, presumably at least so long as the rents are determined "reasonable" by the PHA. 26 U.S.C.A. § 42(h)(6)(B)(iv) and 26 C.F.R. § 1.42-5(c)(1)(xi).
- **Who's Involved?** IRS, state credit allocation agency, owner, management either owner or separate company. If there are additional subsidies, such as vouchers or Project-Based Vouchers, PHA may also be involved.

- **Key Regulatory Features:** State agency regulatory agreement, Treasury regulations at 26 C.F.R. §1.42, Lease. Owner files annual compliance certification with state agency. State Qualified Allocation Plan, copies available at http://www.novoco.com/low_income_housing/lihtc/qap_2013.php
- **Finding Out Where this Housing Is Located in Your Community:** available at: <http://www.huduser.org/portal/datasets/lihtc.html>. This site will also provide general information about the characteristics of the program by state. More accurate data may be available from your state agency, often via its website. To see where units are located on a map and by zip code or address, go to http://www.novoco.com/low_income_housing/resources/maps_data.php This site will also provide basic information about the development including who it serves, bedroom size, types of funding, etc.
- **Tips for Determining What Kind of Housing Is Involved:** Lease; Rent Level; Owner type; Age of Housing (LIHTC can be used for new or rehab, but all post-1986); Ask manager
- **Getting Information:** 26 U.S.C. § 42 (part of Internal Revenue Code); 26 C.F.R. §1.42; state agency rules or guidance (if unpublished, ask state agency); IRS Guide, *Guide for Completing Form 8823 Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition* (Jan. 2011) (available at: <http://www.irs.gov/businesses/small/article/0,,id=235488,00.html>)
- **Related Subprograms or Set-Asides for Special Uses:** determined by state agency rules and Qualified Allocation Plan.

Major Applicant and Tenant Issues

- **Admissions:**
 - Code requirements concerning occupancy of certain units by tenants in specific income categories.
 - Requirement of non-discrimination against Voucher holders, *supra*.
 - Students: Special Rules on Student Eligibility. *See* 26 U.S.C.A. § 42 (i)(3)(D) (West 2012); student status verified annually.
 - Protections (on common substantive criteria and procedural protections) from Fair Housing laws (e.g., Title VIII of the 1968 Civil Rights Act), from any state-imposed requirements pursuant to the QAP and regulatory agreement, or possibly from constitutional sources, e.g., due process (note governmental action and property interest issues).
 - HFA may have awarded tax credits based on owner's commitment to serve special populations
- **Rents**
 - Income-based rents? No, gross rents under program are flat rents based on AMI and number of bedrooms, not individual tenant income; for restricted units, unless owner has agreed to even lower rents with state agency, gross rents are set at either 30% of 50% of AMI, or 30% of 60% of AMI, in both cases with an assumed family size of 1.5 persons per bedroom (one person for 0-BR unit). Calculator for determining rent <http://www.novoco.com/products/rentincome.php>. Rents can increase upward with changes in AMI. 26 U.S.C. § 42(g)(2). Some tenants may have Vouchers (Project-Based or Housing Choice), or other project-based Section 8. with their contributions determined under applicable Section 8 program. Some tenants may have Rural Development (RD) rental assistance.

- Recertification:
 - For mixed-income developments, once annually (tenant right to continued occupancy unaffected by increases in income until 140% of income limit (i.e., 140% of 50% AMI, or 140% of 60% AMI). If recertified tenant income exceeds this 140% limit, the unit can still qualify for credit if owner rents next available unit to eligible family and tenant could stay at LIHTC rent level). However, unclear whether owner could instead claim good cause to evict.
 - If development is 100% LIHTC rent-restricted, IRS does not require recertification after initial occupancy (because next available unit will be rented to eligible family, regardless of any one family's increase in income), but state agency may require additional income recertifications (e.g., CA requires one more after initial occupancy).
 - IRS Guide for Form 8823 (rev. Jan. 2011) references HUD Handbook 4350.3, which outlines requirements for verification of income and assets. HFA may add additional requirements.
 - Utility Allowance: flat rents are gross rents, and where utilities are tenant-paid, tenant must receive a utility allowance based usually on the local PHA's allowance for comparable units with similar utility mix or utility allowance used by Rural Development housing, if applicable. 26 C.F.R. §1.42-10 (may use engineering study).
 - All mandatory charges and any charges for services included in eligibility basis are included in rent.

- **Grievance Procedures:** none required by statute or regulation, although regulatory agreement could do so.

- **Evictions and Terminations**
 - Notice: no federal statutory or regulatory requirements re length and content. Due process (where cause required)? State rules or policies may require certain notice.
 - Good cause required, both during lease and at end of lease term? Good cause required by the statute, *see* IRS Revenue Ruling 2004-82 (July 30, 2004) (statutory interpretation), or by due process, or by the terms of the state's regulatory agreement. *See also, e.g.,* Owner's Annual Certificate of Compliance with state agency; the project's Regulatory Agreement; and various cases, e.g., *Carter v. Maryland Mgmt. Co.*, 835 A.2d 158 (Md. 2003) (good cause required for termination of LIHTC/Voucher tenancy, but good cause found); *Cimarron Village Townhomes, Ltd. v. Washington*, 1999 WL 538110, 1999 Minn. App. LEXIS 890 (Minn. App. 1999) (good cause eviction protection required under LIHTC statute), 659 N.W.2d 811 (Minn. App. 2003) (finding good cause); *Bowling Green Manor v. LaChance*, 1995 Ohio App. LEXIS 2767 (because eviction of Section 8 Voucher tenant from LIHTC unit constituted state action, owner could therefore not refuse to renew lease absent good cause); *Mendoza v. Frenchman Hill Apts.*, No. CS-03-0494-RHW (E.D. Wa. order Jan. 20, 2005) (finding § 1983 claim unavailable to challenge HFA's and owner's failure to include required prohibition on no-cause evictions in regulatory agreement); Jolin, "Good Cause Eviction and the Low Income Housing Tax Credit," 67 U. Chi. L. Rev. 521 (2000); *see also* info on NHLP website <<http://nhlp.org/resourcecenter?tid=106>>.
 - Confusion created because: Tenant may not be aware of good cause requirement, many states do not require provision to be in lease, some just include in lease addendum, IRS Guide to Form 8823, Ch. 26 (rev. Jan. 2011)?, effect of Owner Annual Certification?
 - Pre-judicial administrative review?: None.
 - Effect of eviction on future application to federally assisted housing: no ban, just impact on prior tenant history.

- **Current Important Issues:**
 - Will LIHTC survive budget pressure to restrict various “tax preferences”? How will any reduction in available Vouchers affect number of ELI tenants in LIHTC properties?
 - Use restrictions (15 years) on pre-1990 units have expired, possibly causing displacement if restricted rents were below-market and property exited program; next wave of expirations should occur after 2020 (30 years); major risks concerning compliance and regulatory oversight during the last 15 years of the extended use period after credits have already been taken and recapture period has closed.
 - Fair Housing considerations in location of units (*e.g., Inclusive Communities Project v. Texas Dep’t of HCA* litigation)
 - Basic tenants’ rights often lacking
 - Good cause in the lease, in eviction notices, or in regulations of state tax credit allocation agency?
 - If data demonstrates low voucher utilization, evidence of violation of LIHTC non-discrimination duty or of Fair Housing laws? PHA could provide information about the use of Vouchers in particular developments.
 - Housing and Economic Recovery Act (HERA) of 2008 required HFAs to begin reporting tenant incomes and rent to HUD and in 2011 to gather race and ethnicity data. The information must be available to the public. 42 U.S.C. § 1437z—8
 - Seek to influence the QAP or state agency rules governing LIHTC developments? (state tax credit agency must submit QAP annually after public hearing)
 - Advocacy in QAP process to ensure:
 - LIHTC subsidy linked with other available subsidies to reach needs of very low-income tenants
 - Fair Housing considerations in unit locations
 - Preference or set aside for special populations, preservation of units, etc.